October 20, 2005

Honorable James Sensenbrenner
Chairman House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

**RE: Reauthorization of Section 5 of the Voting Rights Act of 1965**

Dear Chairman Sensenbrenner,

Thank you and the Judiciary Committee for inviting me to speak on the topic of the re-authorization of Section 5 of the Voting Rights Act of 1965 ("VRA"). Since 1982, I have been principally involved in litigation in North Carolina, South Carolina, Virginia and Florida in redistricting and election law issues implementing the Voting Rights Act. A list of the cases in which I have participated is attached to my biography. I have also written a brief law review article entitled "Racial Gerrymandering and the Voting Rights Act in North Carolina" which was published in the Campbell Law Review (9 Camp. L.Rev 255, (1987 ), which I have previously supplied to counsel. I appreciate the invitation to appear and give my views.

In North Carolina we have recently formed an ad hoc group of election lawyers to informally discuss voting issues which arise in elections. This informal group consists of about 20 lawyers who regularly practice in the field of voting litigation. Last year when we met, I raised the issue of whether this bi-partisan group felt that re-authorization of Section 5 was still needed after 40 years of effort. The unanimous conclusion of both Republican and Democrat lawyers was that it is still needed, despite the tremendous advances which have been made in voter participation in the South. I agree with this conclusion and trust that the Congress will vote to approve re-authorization.

Your committee counsel, Kimberly Betz, has asked that I comment on some of the following issues:

> *The Supreme Court's interpretation of the Section 5 pre-clearance requirements - that a covered jurisdiction demonstrate that an election change "does not have the purpose or effect of denying or abridging a citizen's right to vote because of race, color, language or minority status" under a "retrogressive" standard before being legally enforceable. In particular, the hearing will look at what legal retrogression means; how it has been defined by the courts; how it is measured; what Section 5's retrogression standard has meant for covered jurisdictions and its minority citizens; what it means both in the future (especially with respect to redistricting, at-large voting schemes, and "influence"*

*districts); and its effectiveness in ensuring that minorities have the ability to elect candidates of their choice and to participate in the political process, and that "backsliding" is prevented.*

I believe that my comments can be made most useful in the context of the most recent redistricting efforts in the Southeast – particularly in North and South Carolina. In 2000 North Carolina I served as counsel to the North Carolina Republican Party Plaintiffs in challenging the state legislative redistricting plan. [1] In 2000 South Carolina I served as counsel to the State Senate Redistricting Defendants in a suit which drafted a court ordered plan for South Carolina elections.[2]

Section 5 freezes election practices or procedures in certain states until the new procedures have been subjected to review, either after an administrative review by the United States Attorney General, or after a lawsuit before the United States District Court for the District of Columbia. This means that voting changes in covered jurisdictions may not be used until that review has been obtained. North Carolina is a partially covered jurisdiction. South Carolina is a fully covered jurisdiction.

The standard for measurement of retrogression was first defined in *Beer vs. United States*, 425 U.S. 130, 140-142 (1976) and was defined by regulations published by the Attorney General and enforced by the Voting Rights Section. The statutory language of Section 5 required that a covered jurisdiction overcome a presumption of discrimination and show the Attorney General or a three judge panel in D.C., that a voting change did not have a discriminatory purpose or effect.

Proof of discriminatory purpose or effect was easily understood by most practitioners in this field during the 1980s and 1990s. However the meaning of these terms have been modified by three recent Supreme Court decisions: *State of Georgia v. Ashcroft*, 539 U.S. 461 (2003);. *Reno* v. *Bossier Parish School Board*, 528 U.S. 320 (2000) hereinafter (*Bossier I*), *Reno* v. *Bossier Parish School Board*, 520 U.S. 471 (1997)( hereinafter *Bossier II*).

As a practical matter, the effect of these most recent Supreme Court decisions was elimination Section 2 analysis by the Attorney General and eviscerate the "intent" or "purpose" prong of the *Beer* standard . The majority substituted an "effects" test as the sole measure of retrogression. This change has been incorporated in the Department of Justice regulations implementing the act, CFR 51.54 "Discriminatory effect." Will the change make members of a racial or language minority group worse off than they had been before the change with respect to their opportunity to exercise the electoral franchise effectively?

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[1] Stephenson vs. Bartlett (*Stephenson I)*, 355 N.C.354, 562 SE2d 377 (Apr.30, 2002); Stephenson vs. Bartlett (*Stephenson II*) 357 N.C. 301, 582 SE2d 247 (July 16, 2003) and Stephenson vs. Bartlett (*Stephenson III*) 358 NC 219, 595 SE2d 112(Apr.22, 2004)

[2] *Colleton County vs. McConnell*, 201 F.Supp.618 (2002)

As determined by the Department of Justice, retrogression is measured by reference to a "benchmark" standard. In determining whether a submitted change is retrogressive, the Attorney General will normally compare the submitted change to the last legally enforceable voting practice or procedure in effect at the time of the submission. During the 1990's cycle of redistricting, the Voting Rights Department retrogression policy, together with Section 2 litigation efforts from private civil rights groups, greatly increased the number of electoral districts from which black communities could have an equal opportunity to elect candidates of their choice. As my Law Review article points out, this aggressive enforcement led North Carolina from a position where less than 5 black legislators were elected in the late 1970's to where approximately 20 House members and 6 Senators were elected in 2000. This strong enforcement standard was made as a result of a clear congressional policy choice .

As Judge Dickson Phillips points out in his opinion in *Edminsten vs. Gingles*,[3] which

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[3] S.Rep. 97-417, *supra* note 10, at 193 (additional views of Senator Dole) (asserting purpose to eradicate "racial discrimination which ... still exists in the American electoral process"). In making that political judgment, Congress necessarily took into account and rejected as unfounded, or assumed as outweighed, several risks to fundamental political values that opponents of the amendment urged in committee deliberations and floor debate. Among these were the risk that the judicial remedy might actually be at odds with the judgment of significant elements in the racial minority; [FN17] the risk that creating "safe" black-majority single-member districts would perpetuate racial ghettos and racial polarization in voting behavior; [FN18] the risk that reliance upon the judicial remedy would supplant the normal, more healthy processes of acquiring political power by registration, voting and coalition building; [FN19] and the fundamental risk *357 that the recognition of "group voting rights" and the imposing of affirmative obligation upon government to secure those rights by race-conscious electoral mechanisms was alien to the American political tradition. [FN20]

FN17. *See Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 542-46 (Feb. 1, 1982) (hereafter *Senate Hearings* ) (prepared statement of Professor McManus, pointing to disagreements within black community leadership over relative virtues of local districting plans).

FN18. *See Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 97th Cong., 2d Sess., Voting Rights Act, Report on S. 1992, at 42-43 (Comm.Print 1982) (hereafter *Subcommittee Report* ), *reprinted in* S.Rep. No. 97-417, *supra* note 10, 107, 149 (asserting "detrimental consequence of establishing racial polarity in voting where none existed, or was merely episodic, and of establishing race as an accepted factor in the decision-making of elected officials"); *Subcommittee Report, supra*, at 45, *reprinted in*

S.Rep. No. 97-417, *supra* note 10, at 150 (asserting that amended Section 2 would aggravate segregated housing patterns by encouraging blacks to remain in safe black legislative districts).

FN19. *See Subcommittee Report, supra* note 18, at 43-44, *reprinted in* S.Rep. No. 97-417, *supra* note 10, at 149-50.

FN20. *See Senate Hearings, supra*, note 17, at 1351-54 (Feb. 12, 1982) (prepared statement of Professor Blumstein); *id.* at 509-10 (Jan. 28, 1982) (prepared statement of Professor Erler), *reprinted in* S.Rep. No. 97-417, *supra* note 10, at 147; *id.* at 231 (Jan. 27, 1982) (testimony of Professor Berns), *reprinted in* S.Rep. No. 97-417, *supra* note 10, at 147.

interpreted for the first time the 1982 Amendments to the Voting Rights Act.:

> "In enacting amended Section 2, Congress made a deliberate political judgment that the time had come to apply the statute's remedial measures to *present conditions* of racial vote dilution that might be established in particular litigation; that national policy respecting minority voting rights could no longer await the securing of those rights by normal political processes, or by voluntary action of state and local governments, or by judicial remedies limited to proof of intentional racial discrimination. . . .
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> For courts applying Section 2, the significance of Congress's general rejection or assumption of these risks as a matter of political judgment is that they are not among the circumstances to be considered in determining whether a challenged electoral mechanism presently "results" in racial vote dilution, either as a new or perpetuated condition. If it does, the remedy follows, all risks to these values having been assessed and accepted by Congress. It is therefore irrelevant for courts applying amended Section 2 to speculate or to attempt to make findings as to whether a presently existing condition of racial vote dilution is likely in due course to be removed by normal political processes, or by affirmative acts of the affected government, or that some elements of the racial minority prefer to rely upon those processes rather than having the judicial remedy invoked.

It is unlikely that the Congress meant to implement an aggressive policy in the enforcement of Section 2 and have a different standard in its retrogression analysis of Section 5. I do not believe that was the Congressional intent. Put differently, the Voting Rights Act is intended to implement an intentional Congressional policy choice – creation of minority majority districts in which minority voters have an equal opportunity to elect a candidate of the choice. Congress did not ask the Justice Department nor the courts to measure "influence" or other intangibles, as desirable as the other intangibles maybe. A clear bright line test easily implemented and understood by states and municipalities is what was desired and implemented.

The importance of continued Section 5 enforcement is shown in the 2000 cycle of redistricting. In *Stephenson I,* Judge Knox Jenkins, a conservative democrat state superior court judge, found that the state legislature had failed follow Section 2 and Section 5 guidelines as well as the state constitutional limits in establishing legislative districts. In his remedial decisions, *Stephenson II* Judge Jenkins found the *Gingles* preconditions to exist in several areas of the state and created a court drawn plan adding minority districts in some areas and strengthening minority concentrations in others to correct or ameliorate the problems of racial polarization which he found present in the state legislative plans. Similarly In *Colleton County,* a three judge panel consisting of federal Circuit Judges William B.Traxler, Joseph F. Anderson and Mathew Perry, in South Carolina found as follows:

> "The history of racially polarized voting in South Carolina is long and well documented – so much so that in 1992 the parties in *Burton* stipulated that "since 1984 there is evidence of

> racially polarized voting in South Carolina." Burton, 793 F.Supp at 1357-58. The three-judge panel in *Smith* made a similar finding . . . . Smith, 946 F.Supp. At 1202-03...
> "In this case, the parties have presented substantial evidence that this disturbing fact has seen little change in the last decade. Voting in South Carolina continues to be racially polarized to a very high degree, in all regions of the state and in both primary and general elections....

In fact in all jurisdictions in which I have litigated, it would be difficult to find areas of a jurisdiction in which most of the *Gingles* preconditions do not exist and that most of the requirements of the "totality of the circumstances" do not also exist.

In reauthorizing Section 5, it is evident to me that most if not all of the minority districts which have been drafted are a result of the preventive effects of Section 5 and the desire on the part of jurisdictions to avoid Section 2 litigation. However it is also clear to me as shown in both North and South Carolina litigations this year, that political elements within the South would seek to retrogress or backslide in the obligations to be racially fair in making redistricting decisions.

The 1990's voting rights litigation established a high benchmark in the total number of effective black minority districts in the South. Due to population trends, most of these minority districts suffered population losses over the decade. The residual population of the districts on census day is the measure of minority voting strength which must be maintained. It is against this benchmark that the 2000 redistricting legislation should be measured. However, the reductions in total population and in voting age population in many black communities in the Southeast were used by map drafters to reduce the effective black voting strength in many marginal districts. In addition, the growth in non-citizen minority populations in many parts of the South also allowed reductions in black voting strength to be reduced. It is in these districts (where a combination of out migration of black population and in migration of non-citizen populations) where much of reduction in effective black voting districts has occurred. In addition to the population trends, white democrat incumbents used a theory of "influence districts" to bleach minority districts and place black voters in surrounding white districts to insure the election of white democrat incumbents.

The strongest example is in the *Colleton County* case, where the Governor vetoed redistricting plans and urged in lieu of effective minority district concentrations weakened or bleached minority districts with minority voting age populations well below 45% in many areas. His expert witnesses urged these positions on the three judge panel which properly rejected this idea. *Colleton* at 556-664. However the *Aschcroft* case in Georgia provides equally as vivid examples of this flawed idea.

The focus of the Congressional inquiry should be on the community whose voting strength is being given legal protection from discrimination. Where there is a systematic history of racially polarized voting, and where without legal protection, a minority community has not historically been able to consistently achieve constitutional parity with other racial groups, then the group should be able to select a candidate of its choice. Sharing the choice with non group members is not equal opportunity

but lessened opportunity.

Focus on legislative action after redistricting also suffers from this same point. Clearly politicians of whatever race, have mixed motives in legislative votes. Legislation is by its nature a trade-off. A legislator of whatever race may be willing to trade his vote in favor of a redistricting plan in which he is preserved and protected not to create other minority districts elsewhere. This leaves new or emerging minority communities without a political opportunity to elect a candidate of their own. Influence districts are not a remedy or an answer to this problem. In redistricting to require a black incumbent or emerging minority district community to voluntarily reduce their core constituency to improve the election chances of an adjoining white incumbent in return for "legislative" power later is not a choice which other racial communities or legislators are asked to make. Furthermore, it simply goes against incumbent self preservation to require one's most active supporters to be fractured or cracked.

North Carolina, a state where the legislature is controlled by white democrats, like Georgia, provides another example of the use of influence districts. North Carolina's redistricting history in the 2000 cycle is complex in part due to state constitutional questions which were litigated during this cycle.[4] Chief among the issues, however is the impact of retrogression because in several districts the issue of the measurement and what constitutes retrogression became an important issue.

Following the release of the census information, North Carolina represented to the Justice Department that there were 20 House VRA districts with substantial black populations.[5] Most of the reduction in black voting strength comes in covered counties in eastern North Carolina where the historically rural black population resides.

In the initial draft of legislative districts, the General Assembly created 21 districts which they contended were "effective" minority districts. Large losses in depopulated districts were made up by putting white "Republican" voters in these black districts. The plan also contained three districts, with a population of at least forty percent (40%), which would "afford black voters a strong likelihood of being a dominant force able to elect representatives of their choice." *Id.* District 18 (Brunswick, Columbus, New Hanover, and Pender) 44.00%; District 29 (Durham) 40.22%; District 72 (Forsyth) 45.16%. The State, in its preclearance submissions, argued that District 87, while having a black population of 29.86% and having never elected a black representative, was one of the twenty one

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[4] *Stephenson v. Bartlett*, 122 S. Ct. 1751, 70 U.S.L.W. 3709 (2002) (Rehnquist, C.J., In Chambers); *Stephenson v. Bartlett*, 180 F. Supp.2d 779 (E.D.N.C. 2001), *appeal dismissed* (4th Cir. 2002) *Sample vs. Jenkins* Case No. 5:02CV383 and *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*"Stephenson I"*) and *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (*"Stephenson II"*).

[5] See Preclearance Submission for Sutton 3 - 2001 House Redistricting Plan (undated), H-27N Effect of Adoption of Sutton 3 on Minority Voters.

districts that has a black majority of . . . voters who are registered Democrats, . . . [and thus,] black voters have the potential to control the Democratic Primary. *Id.* In sum, in the submissions to the Department of Justice, the state argued that black percentages of less than 50% but more than 40% in some cases established "effective black districts" because of the "black percentage of Democrat primary electorate and the success of Democratic nominees in general elections regardless of race."[6] Amazingly this plan was precleared under the relaxed standards of *Bossier I or II,* even through competing plans introduced in the legislature had fairly drawn alternatives which had greater concentrations of minority voters and met redistricting criteria.

The effect of these plans was evident. For example, in Pitt County, North Carolina, House District 8, a white incumbent has been able to remain her legislative position because of low percentages of black population included in the districts, notwithstanding the fact that sufficient black population exists in Pitt County to create a district in which the black community could nominate and elect a candidate of its choice. White candidates continue to represent this district, although it is clear that alternatives to this district could have produced a district in which the black community could nominate and elect a candidate of their choice.

Comparing the treatment of the legislature with that of the state court is useful to show that intent to retrogress still exists in the legislative bodies throughout the South when it is useful for partisan political ends. Sutton 3 (*infra*), was found to be unconstitutional on state constitutional grounds. Subsequently the state court was able to draw a 23 seat minority district plan by strengthening existing black concentrations and creating an additional VRA district in in Wake County. For example, the court plan also reconfigured VRA districts in Guilford to apply with traditional redistricting principles. Districts 33 (48.59%) and 38 (45.61%) in Wake County were created to ensure compliance with federal law. In Guilford County, VRA District 58 was reconfigured with a total black population of 57.69% and District 60 with a total black population of 59.95%. In District 18, the court increased the total black population to 46.99%. This created a total of approximately 23 VRA districts. The court's interim districts were precleared on July 12, 2002. These districts were utilized in the election of 2002.

After the November 2002 elections, the General Assembly declined to draft districts in its regular session and waited until mid November, 2003 to draft new districts. SL 2003-434 contained 21 new VRA House districts and 12 which reduced black voting strength. Most, if not all, of the reductions were used to fracture the core VRA constituent districts created in the court drawn plan and result in shifting black democrats to assist white democratic districts in adjacent districts. The effects were the same as in Georgia, however the Justice Department precleared these plans pending federal litigation in the D.C. Circuit.

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[6] Preclearance Submission for Sutton 3 - 2001 House Redistricting Plan (undated) H-27N Effect of Adoption of Sutton 3 on Minority Voters.

Interestingly, in the VRA house district created in Wake County ( a second VRA district for Raleigh) democrats nominated a white democrat, Deborah Ross when two black candidates spilt the minority vote. She was elected in the fall. In the redrafting of the districts, she utilized her incumbency to reduce the voting strength in this potential district. (Election statistics for this contest are attached).

In summary, the 2000 history of redistricting in North Carolina showed a concerted attempt on the part of the Legislative leadership to minimalize black voting strength in existing districts and in marginal districts in the state to draw districts in which the black communities' voting strength would be secondary to the ability to elect white democrat representatives. This trade-off in marginal VRA areas, even if supported by minority legislators who may have more legislative influence to gain in support a redistricting plan, does not favor the voting interests of the black community as traditionally understood in Voting Rights law. Put differently, in a system in which loyalty to leadership is rewarded, black incumbents are put in a difficult position of defying white leadership and jeopardizing their own chances of re-election in their districts to support creation of new or stronger black districts elsewhere.

I realize this committee faces a factual predicate for renewal of Section 5, that its predecessors do not face. Voting registration and participation of minorities has greatly improved, however political incentives to reduce these improvements are still present and have been demonstrated during the 2000 redistricting cycle. It is critically important to remember that failure to authorize Section 5 would result in the immediate legal enforceablity of many racially discriminatory statutes which would push back racial progress in office holding. For example, Section 5 preclearance review had currently held in abeyance or stayed the state from enforcing the state constitutional requirement that a county cannot be subdivided in the creation of a legislative district. However were Section 5 not to be renewed, this state constitutional provision would be enforced. Many other statutes that have not been repealed would suddenly be enforceable. At a minimum the Congress should require jurisdictions which want to escape Section 5 preclearance conditions to repeal enactments which have been found by the courts or the Justice Department to be retrogressive in the past.

Furthermore, the Congress should resolve the dilemma which the *Bossier* cases have placed it in with regard to the retrogression standards. My own opinion is that Congress should clearly spell out the standard it wishes to be used in "purpose" evaluations. The standard should be objective, clear and pragmatic. The test practitioners are left with in *Bossier* and *Ashcroft* is too subjective. It will leave the Department of Justice or a court with discretionary review power which is capable of arbitrary and capricious rulings.

The *Ashcroft* approach leads the Justice Department or court to answer questions such as: "Whether minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive role, in the electoral process"; " the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account"; or various studies suggest that the most effective way to maximize minority voting strength may be to create more influence or coalitional districts?" How would a court or the Department of Justice go about a minority

group's opportunity to participate in the political process by examining the comparative position of black representatives' legislative leadership, influence? These subjective factors move the focus away from the original intent of Congress to create election districts in which the minority community is assured of electing candidates of its choice and not those whom the surrounding community may wish to reward for proper legislative or political behavior – influence in the legislative body.

In lieu of these questions, I believe the approach which the federal court took in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir.,1990) *cert.denied* 498 U.S., 1028 (1991) would be a desirable "purpose" approach which would not involve itself in the issues raised in *Ashcroft* and *Bossier I and II* . In his concurring opinion, Judge Kozinski showed how a jurisdiction can enact a voting change which has a discriminatory effect without a malicious motive or purpose.

"Protecting incumbency and safeguarding the voting rights of minorities are purposes often at war with each other. Ethnic and racial communities are natural breeding grounds for challengers; incumbents greet the emergence of such power bases in their districts with all the hospitality corporate managers show hostile takeover bids. . . [Incumbents] who take advantage of their status so as to assure themselves a secure seat at the expense of emerging minority candidates may well be violating the Voting Rights Act.[7]

A voting change which fails to recognize the realities of demographic changes in the electorate and which enacts a statute or rule disadvantaging minority voting strength is clearly purposeful discrimination which the Congress wanted to outlaw in Section 5. This point needs clarification in the new legislation.

In summary, it would be my position that the Congress should reauthorize Section 5 of the Voting Rights Act with a clear definition of how it desires retrogressive purpose and effect to be measured and the specific tests – both mathematical and subjective, it would desire a court to use in examining this issue. I would hope that the court would adopt the dissenting views in *Ashcroft* or the views of Judge Kozinski to achieve this standard.

Sincerely yours,

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[7] Judge Kosinski cites an example to illustrate this point regarding agreements among neighbors not to sell to minorities. A racial covenant not to sell has no "retrogressive" effects since there are not minorities in the neighborhood at the time the agreement is reached. Incumbency protection agreements are the same. What matters is not that you may not have a discriminatory purpose in signing such an agreement, you may want to keep property values high, nevertheless you take actions to keep minorities out of the neighborhood or out of power. *Id.* at n. 1.

Robert N. Hunter, Jr.

RNHjr/slh